

Claimant asserts he sustained a left knee injury on August 10, 2010, while working for respondent. The Administrative Law Judge (ALJ) ordered temporary total disability compensation to commence upon surgery and continuing until claimant is released to any substantial or gainful employment. Respondent was ordered to pay an unauthorized medical expense of \$389 and court reporter fees for the hearing, and Dr. Lowry Jones was

confirmed as the authorized physician to perform claimant's replacement surgery for his left knee.

The respondent requests review of whether the need for knee replacement surgery is necessitated by an injury that arose out of and in the course of the claimant's employment or whether the need for surgery is due to a pre-existing condition. Respondent argues that although the claimant needs knee replacement surgery, that need is necessitated by claimant's pre-existing arthritis, not the claimed on-the-job injury. Therefore the ALJ's Order should be reversed.

Claimant argues that the Order should be affirmed.

FINDINGS OF FACT

After reviewing the record compiled to date, the undersigned Board Member concludes the preliminary hearing Order should be affirmed.

Claimant worked for respondent for three years before his accident. On August 10, 2010, claimant was pouring concrete for a parking garage and was walking on top of rebar when his foot got hooked and he fell landing on his left knee. Claimant had immediate pain and swelling and discoloration of the knee. He reported his fall the next day to Mark "Tony" Teegarden, the foreman and superintendent. Mr. Teegarden did not testify in this matter. Claimant was not offered any medical treatment and was not asked to fill out any paperwork.

Claimant's job for respondent was as a foreman and was a very hands-on manual labor position. Claimant was constantly on his feet and did a lot of bending, lifting, kneeling, squatting and carrying. He testified that there is no way he would be able to perform the job under the restrictions imposed by Dr. Jones. He also testified that there is no work available with respondent under Dr. Jones' restrictions.

Claimant confirmed that he had surgery on his left knee in 1963 as a result of a wrestling injury. He obtained a good result from the surgery and had no further problems until after his fall in August 2010. Claimant's current complaints are constant swelling and soreness in his knee and difficulty walking or standing for an excessively long period of time. He also complains of a bone on bone feeling and an ache or numb feeling and a popping sound in his left hip. Claimant denies having any problems with his hip before his fall in August 2010. He testified that he has done construction his whole life and never had any problems until the fall. Claimant testified that although he was involved in a vehicle accident that totaled his car on August 20, 2010, he did not suffer any additional injury to his knee or hip.

Claimant was first examined and treated by orthopedic surgeon Gerald F. Dugan, M.D., on November 15, 2010. Dr. Dugan found claimant to have trochanteric

bursitis of the left hip, degenerative joint disease of the left knee and gait dysfunction. Dr. Dugan opined that claimant sustained a mild exacerbation of severe chronic degenerative joint disease about the left knee. Claimant admits that he has severe arthritis in his knee. The x-ray report signed by Dr. Dugan on November 17, 2010, indicated chronic degenerative changes of the left knee, complete lateral joint space collapse, and cystic changes along the medial tibial plateau. He also noted moderate-to-severe patellofemoral arthrosis. The x-rays did not show any acute or chronic change.

Claimant was re-examined by Dr. Dugan on February 28, 2011. At that time claimant displayed continued pain, worse with weight bearing, loss of function, give way sensation and mechanical sensations in the left lower extremity. Claimant also displayed gross crepitance in all three compartments with active range of motion testing. Claimant was released back to full duty with the only recommendation being a total knee arthroplasty. Dr. Dugan, in his March 4, 2011 office note, stated that claimant's residual symptoms were the result of his chronic degenerative change and not the result of his work.

Claimant was referred by his attorney to board certified orthopedic surgeon Edward J. Prostic, M.D., on October 17, 2011. Claimant was diagnosed with trochanteric bursitis of the left hip and degenerative arthritis of the left knee. X-rays displayed severe osteoarthritis of the lateral compartment with significant valgus deformity of the knee. Dr. Prostic stated that claimant had aggravated pre-existing degenerative joint disease of the knee and a total knee replacement arthroplasty would be required.

Claimant returned to Dr. Prostic on June 19, 2012, with the doctor's opinion unchanged. Dr. Prostic continued to assert that claimant had sustained a permanent aggravation to his left knee during the course of his employment and would require a total knee replacement arthroplasty.

Claimant was referred to board certified orthopedic surgeon Lowry Jones, Jr. M.D., on April 5, 2012, for a court ordered IME. Dr. Jones ordered an MRI of claimant's left knee and recommended knee replacement. Dr. Jones found that as a result of the August 2010 incident, claimant aggravated his preexisting left knee arthritis, likely developed an acute medial meniscal injury and aggravated his lateral joint line arthritic disease. He opined that claimant would more than likely need surgery despite the arthritis. Dr. Jones examined claimant again on May 24, 2012. His opinion of claimant's conditions and the causes of those conditions did not change.

Jeffrey Grego, president/owner of Tribeca Concrete Construction, testified that all injuries must be reported to a foreman/superintendent so that the proper paperwork can be filled out and the employee can be sent for a mandatory drug screening. Mr. Grego testified that since the company was small he was often at the work sites and was around the site on the day of claimant's alleged injury accident.

Mr. Grego testified that it had been reported to him that claimant was clumsy and had been falling a lot, so it would be a good idea to keep an eye on him and make sure he is not drunk while working. He learned of claimant's injuries by letter from claimant's attorney dated August 19, 2010. He made some calls to find out why he had not been notified and was told that nothing had been reported.

Mr. Grego testified that his company was a subcontractor to Key Construction on the job claimant was working on the day of the alleged accident. Once a week there were safety meetings.

PRINCIPLES OF LAW AND ANALYSIS

In workers compensation litigation, it is the claimant's burden to prove his or her entitlement to benefits by a preponderance of the credible evidence.¹

The burden of proof means the burden of a party to persuade the trier of fact by a preponderance of the credible evidence that such party's position on an issue is more probably true than not true on the basis of the whole record.²

If in any employment to which the workers compensation act applies, personal injury by accident arising out of and in the course of employment is caused to an employee, the employer shall be liable to pay compensation to the employee in accordance with the provisions of the workers compensation act.³

The two phrases "arising out of" and "in the course of," as used in K.S.A. 44-501, et seq.,

. . . have separate and distinct meanings; they are conjunctive and each condition must exist before compensation is allowable. The phrase "in the course of" employment relates to the time, place and circumstances under which the accident occurred, and means the injury happened while the workman was at work in his employer's service. The phrase "out of" the employment points to the cause or origin of the accident and requires some causal connection between the accidental injury and the employment. An injury arises "out of" employment if it arises out of the nature, conditions, obligations and incidents of the employment."⁴

¹ K.S.A. 44-501 and K.S.A. 44-508(g).

² *In re Estate of Robinson*, 236 Kan. 431, 690 P.2d 1383 (1984).

³ K.S.A. 44-501(a).

⁴ *Hormann v. New Hampshire Ins. Co.*, 236 Kan. 190, 689 P.2d 837 (1984); citing *Newman v. Bennett*, 212 Kan. 562, Syl. ¶ 1, 512 P.2d 497 (1973).

Claimant alleges an accident on August 10, 2010, when he fell onto his left knee. This record contains three medical opinions regarding whether that fall aggravated claimant's pre-existing arthritis in that knee. Dr. Prostic, claimant's hired expert clearly found an aggravation. Dr. Dugan, the authorized treating physician, found a temporary aggravation only, with the need for the knee replacement stemming from the arthritis and not the work injury. Dr. Jones, the court ordered IME doctor found, in his report of April 5, 2012, an aggravation of claimant's pre-existing left knee arthritis from the August 2010 accident. However, in his followup report of May 24, 2012, from the examination requested by respondent's insurance company, he stated that claimant understands that "there is no other explanation for his pain other than the severe arthritis."⁵ This report did not change the earlier opinion that the arthritis was aggravated by the work injury.

This Board Member finds that claimant has satisfied his burden of proving that he suffered an accidental injury which arose out of and in the course of his employment with respondent on August 10, 2010, and that accident permanently aggravated claimant's pre-existing arthritis in his knee. The Order of the ALJ allowing medical treatment, including a total knee replacement, is affirmed.

By statute, the above preliminary hearing findings and conclusions are neither final nor binding as they may be modified upon a full hearing of the claim.⁶ Moreover, this review of a preliminary hearing Order has been determined by only one Board Member, as permitted by K.S.A. 2011 Supp. 44-551(i)(2)(A), unlike appeals of final orders, which are considered by all five members of the Board.

CONCLUSIONS

Claimant has proven, by a preponderance of the credible evidence, for preliminary hearing purposes, that he suffered personal injury by accident on August 10, 2010, and that accident permanently aggravated claimant's pre-existing arthritic condition in his left knee. The Order granting claimant medical treatment, including a total knee replacement of the left knee is affirmed.

DECISION

WHEREFORE, it is the finding, decision and order of the undersigned Board Member that the Order of Administrative Law Judge Steven J. Howard dated August 23, 2012, is affirmed.

⁵ P.H. Trans. (Aug. 23, 2012), Joint Ex. 1.

⁶ K.S.A. 44-534a.

IT IS SO ORDERED.

Dated this _____ day of October, 2012.

HONORABLE GARY M. KORTE
BOARD MEMBER

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